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No. 07-1119

FILED

MAR 3 1 2008

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SUPREME COURT, U.S.

In the Supreme Court of the United States

DENNIS PEET and JEEMELL SPENCER,
Petitioners,

v.

CITY OF DETROIT; DWIGHT PEARSON; LOVIER, SERGEANT; SULLIVAN, SERGEANT; HOWARD PHILIPS; PETERSEN, SERGEANT; DEBORAH NIX; JACKSON, LIEUTENANT; J. FISHER; BARBARA SIMON; WILLIAM RICE; CHARLES HOWARD; MARK AMOS, ED RUDONI; VISBARA, SERGEANT; CATHERINE ADAMS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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COUNTER- STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PETITIONERS FAILED TO SHOW A "TRUE CONFLICT" APPLICABLE TO THIS CASE AND WORTHY OF THIS COURT'S REVIEW, WHERE ANY PURPORTED CONFLICT AMONG THE CIRCUITS REGARDING THE ELEMENTS OF A MALICIOUS PROSECUTION CLAIM IS IMMATERIAL, AS THE SIXTH CIRCUIT CORRECTLY HELD THAT THE KEY ELEMENT OF PROBABLE CAUSE TO ARREST EXISTED AND PETITIONERS DID NOT QUESTION THE ELEMENTS OF A MALICIOUS PROSECUTION CLAIM BELOW?

The District Court says,	"Yes".
The United States Sixth Circuit Court says,	"Yes".
Respondents say,	"Yes".
Petitioners say,	"No".

II. WHETHER THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT PROBABLE CAUSE EXISTED FOR PLAINTIFFS' ARRESTS WHEN AN EYEWITNESS IDENTIFICATION EXISTED AND NO GENUINE ISSUE OF MATERIAL FACT EXISTED TO SHOW THAT EXCULPATORY INFORMATION WAS WITHHELD OR THAT THE EYEWITNESS WAS UNRELIABLE AT THE TIME OF THE ARREST?

The District Court says,	"Yes".
The United States Sixth Circuit Court says,	"Yes".
Respondents say,	"Yes".
Petitioners say,	"No".

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42 U.S.C.§1983 ..... *passim*

COUNTER-STATEMENT OF CASE AND FACTS

Petitioners filed an action pursuant to 42 U.S.C.§1983 seeking damages from individual Detroit police officers for the deprivation of their Fourth Amendment rights for arresting them without probable cause and for the malicious prosecution of the Plaintiffs. Specifically, Petitioners claim that Detective Pearson failed to provide exculpatory information which would have negated probable clause. Petitioners also alleged that the City of Detroit was liable for the officers' constitutional violation because it has a custom or policy of tolerating the arrest of "witnesses" without probable cause. The district court granted summary judgment in favor of the Defendants because "probable cause supported Spencer's and Peet's arrest for the robbery of Reed Byrd based on the eyewitness identification. Ahlers v. Schebil, 188 F.3d 365, 370-371 (6th Cir. 1999). (Pet. Apx. Pgs. 52, 54). The district court held that because probable cause existed to arrest Peet and Spencer, Pearson should be granted summary judgment on their malicious prosecution claim. (Pet. Apx. Pg. 54).

The Sixth Circuit held that "no reasonable juror could disagree that the police could have reasonably believed that Spencer had robbed Reed Byrd, based on Feanda Wilson's knowledge of Spencer's pager number, combined with her statement that the owner of the pager participated in taking Byrd's coat by force". Further, Ms. "Wilson's eyewitness identification statement is trustworthy information" to justify a reasonable belief that Peet and Spencer robbed Byrd

at the time detective Pearson submitted the warrant request. (Pet. Apx. Pgs 75, 76, 80).

UNDERLYING FACTS

Feanda Wilson Meets Peet and Spencer.

In the late night hours of April 27, 2000, Plaintiff Dennis Peet and his cousin, Jeemell Spencer, went to a Super City Coney Island Restaurant on Mack Avenue in the City of Detroit. Plaintiff Peet was driving his wife's blue pick-up truck. When they arrived at the location, Mr. Peet parked the pick-up truck in the parking lot, facing the front of the restaurant which had a glass door. Mr. Peet parked his truck near a red Ford Escort in the parking lot, belonging to the victim, Reed Byrd, Jr.

When Plaintiff and Spencer exited the truck, the restaurant's Clerk, Feanda Wilson, was outside, sitting in the passenger seat of the red Ford Escort with her friend, Reed Roosevelt Byrd, Jr. When Plaintiffs went inside the restaurant to place food orders, Ms. Wilson exited Mr. Byrd's vehicle and entered the restaurant to service them. She left Mr. Byrd seated in the driver's seat of his automobile.

While Ms. Wilson was servicing Plaintiffs, Plaintiff Spencer began speaking to her about securing a date with her. After placing his order, Plaintiff Peet went outside to his truck to prepare a marijuana cigarette and wait for Plaintiff Spencer and the food. Before leaving the restaurant, Plaintiff Spencer gave Ms. Wilson the number to his pager. Shortly after Plaintiff Spencer exited, an unidentified individual rounded the

corner of the Coney Island building and entered a gas station which adjoins the restaurant. An individual named Jmo Bracey was in the gas station and was robbed of his money and jacket by the gunman at gunpoint. Mr. Bracey and Plaintiff Peet have been acquainted since childhood and were neighbors. The gunmen then exited the gas station and entered the Coney Island restaurant, where he robbed and shot a customer, Leonard M^{c}Glory,(also called Leonard Woodward) then exited the building through the front glass door.

The Robbery and Shooting of Byrd

Within seconds after robbing and shooting Leonard M^{c}Glory, the gunman exited the restaurant, walked near Plaintiff Spencer, who pointed to Mr. Reed and told the gunman to, "Shoot that Motherf- -ker, too." The gunman shot Reed Roosevelt Byrd, Jr. after being told to do so by Plaintiff Spencer. After Mr. Reed was shot, Peet and Spencer robbed Mr. Reed of the coat he was wearing as he lay dying. Both Plaintiffs Peet and Spencer and the unidentified gunman then fled the restaurant at the approximate same time after the shooting of Mr. Reed. Ms. Wilson, who was inside the Coney Island at the time of both shootings, witnessed the shooting and robbery of Mr. Byrd, who died after surgery from the injuries sustained in the shooting.

Police at the Scene

City of Detroit Police Officers were called to the scene. Upon their arrival, Officers Robert Peterson and Charles Howard observed the victim, Mr. Byrd, lying on the floor of the restaurant, suffering from a

gunshot wound to the abdomen. Mr. Byrd was conveyed by ambulance to Detroit Receiving Hospital, where he later died.

Statements were taken from individuals who claimed to have witnessed the incident. Feanda Wilson gave a statement which included a description of the gunman and both plaintiffs. She also gave the Police Officers the pager number that had been given to her by Plaintiff Spencer. The other alleged witnesses, Leonard McGlory, Jmo Bracey and Kenya Smith (the cook at the restaurant), also gave the Detroit Police Officers statements.

Feanda Wilson stated that she could clearly observe from the booth the shooting of Byrd by the gunman when Spencer said "Shoot the motherfu------r" and observed the robbery of his coat and shirt by Peet because she could see the car parked through the glass door.

The Investigation of The Murder - The Pager

After the death of Mr. Byrd, City of Detroit Homicide Investigator Dwight Pearson was assigned to be the Officer-in-Charge of the murder investigation. During the course of the murder investigation, Plaintiff Spencer was located and identified through the pager number he had given to Feanda Wilson. Plaintiff Peet was discovered to be the person who was with Jeemell Spencer on the night of the murder. Spencer and Peet were conveyed to the Homicide Unit of the Detroit Police Department and Spencer was positively identified by Feanda Wilson as the individual who told the gunman to shoot Reed

Byrd and Peet was identified as the person who robbed Mr. Byrd of his jacket. Based on Feanda Wilson's positive identification, Investigator Pearson prepared a Warrant Request and presented it to the Wayne County Prosecutor's Office. Operating on the premise that Ms. Wilson's statement established a prima facie case of probable cause relative to whether Plaintiffs-Petitioners were working in concert with the unidentified shooter, the Warrant Request was presented to the Wayne County Prosecutor. The Warrant Request identified Dennis Peet and Jeemell Spencer as complicit in the felony murder of Roosevelt Byrd, Jr. and detailed each person's involvement. The Investigator's Report and Supplement further advised that a third "unidentified" individual was the gunman. The Warrant Request included witness statements from Leonard M^{C}Glory, Jmo Bracey and John Anderson, who did not identify either Plaintiff as being involved in the murder or robbery of Reed Byrd. On the date that the Warrant Request was prepared by Investigator Dwight Pearson, April 28, 2000 (the day after the murder), Investigator Pearson tendered all then existing Witness Statements to the Wayne County Prosecutor's Office. No evidence or statements were withheld.

The Wayne County Prosecutor's Office submitted the Warrant Request to a District Court Judge who signed the Warrant Request. Plaintiffs Peet and Spencer were arrested and at a Preliminary Examination on May 24, 2004, both Plaintiffs were bound over for trial on the following charges: (1) First Degree Premeditated Murder; (2) Felony Murder; (3) Assault with Intend to Commit Murder; and (4) Felony Firearm. On March 12, 2001, both Plaintiffs were

acquitted in a jury trial held in Wayne County Circuit Court's Criminal Division.

During the continued investigation, Investigator Pearson became aware of the fact that Ms. Wilson was the only witness who implicated Peet and Spencer. He included the following in his Progress Notes on May 2, 2000:

> 5-2-00
>
> 8:00 pm After reviewing all statements given, Feanda Wilson is the only statement out of place. Setting up polygraph for her for 5-3-00 to see if she is lying about the suspect the warrant was typed on. Feanda no longer works at Super Coney Island. Fired for stolen money from business.

Jmo Bracey made a statement on April 28th and described the three perpetrators. In his initial statement he stated that one of the suspects gave Feanda his pager. Bracey said as the Sixth Circuit noted, that "the girl who worked in the Coney Island", presumably Feanda Wilson, "told him that the men had been in the restaurant prior to the shooting" and that a friend of the shooters had given her his number". (Pet. Apx. Pg. 76).

None of the witnesses provided exculpatory information until after the warrant request and their credibility was questionable. The first witness, Julian "Doc" Latham, is a homeless individual who allegedly witnessed the subject incident. Plaintiff located him,

picked him up and brought him to a deposition in this matter. Mr. Latham testified at the deposition that he has known both Plaintiffs for many years and considers them "like family." After the murder, Mr. Latham was located and conveyed to the Detroit Police Department to give a statement concerning what he observed. Once at Police Headquarters, however, it was learned that Mr. Latham had outstanding warrants for his arrest and was sent to the Dickerson Correctional Facility after he gave his witness statement. The second witness was Jmo Bracey. Mr. Bracey was arrested after Mr. Byrd's death, but not as a witness; Mr. Bracey admitted at a deposition that he was arrested for attempting to distribute drugs. After he bonded out of jail, he voluntarily presented to the Detroit Police Department's Homicide Unit and told the officers that he had been threatened by Dennis Peet's family members to "tell the police that Dennis was not involved and feared for his life."

The third witness, Darryl Williams, testified at a deposition that he is Plaintiff Peet's "best friend." He went to Jmo Bracey's home and told him (Bracey) that Dennis Peet's family wanted him to go down to the Police Homicide Unit and tell the police officer that it "wasn't them" (referring to Peet and Spencer). Mr. Williams was advised that if he continued with his antics, he would be arrested and charged with "Interfering in a Police Investigation." Leonard Woodward's (aka Leonard McGlory) statement which was given to the prosecutor, did not state that Peet and Spencer were not involved, because he made no such representation in his statement. Woodward allegedly made these verbal representations of Peet

and Spencer's innocence after the warrant request and during this civil litigation.

REASONS FOR DENYING THE WRIT

Petitioners try to inflate this case into one presenting an important question regarding the scope of the elements of a malicious prosecution claim under the Supreme Court case of Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed. 2d 114 (1994), but it is nothing of the sort. The Sixth Circuit Court of Appeals correctly determined that probable cause to arrest the Petitioners existed based upon an eyewitness identification and other evidence. Further, the conflict among the various circuits on the proper elements of a malicious prosecution claim is immaterial to the outcome of the case in light of the record and does not present an issue of practical significance to warrant review by this Court.

I. CONSIDERATION OF THE ALBRIGHT DECISION TO DEFINE THE ELEMENTS OF MALICIOUS PROSECUTION IS IMMATERIAL TO THE OUTCOME OF THE CASE AND THE ISSUE DOES NOT WARRANT REVIEW BY THIS COURT AS THERE IS NO "TRUE CONFLICT" IN THE INSTANT CASE.

The Petition presents no compelling reason supporting the exercise of this Court's jurisdiction. The Sixth Circuit Court of Appeals correctly interpreted and applied the law according to the specific factual circumstances of this case. It properly determined that probable cause to arrest Petitioners Peet and Spencer existed. The decision comports with published

precedent and was correctly applied according to the facts. The Sixth Circuit's decision does not warrant intervention by this Court.

In an effort to prove otherwise, Petitioners raise the issue of a conflict among the various circuits regarding the elements of a malicious prosecution claim to justify the court's intervention and the alleged need to elaborate upon the correct elements. Petitioners do so based on the misleading argument that this case falls within "'the embarrassing diversity of judicial opinion" over the composition, or even existence, of a claim for 'malicious prosecution' founded in §1983". (Petitioners' Brief, p 11).

The Petitioners' reason for granting the writ based on the conflict of the various circuits, is not based on the issues actually raised by Petitioners below or actually decided or addressed by the Sixth Circuit because it was not germane to the determination of the decision below. Petitioners raise the issue of the varying standards to establish a malicious prosecution claim for the first time in this Court on the false premise that bears no resemblance to what issues were actually raised and decided in lower court.

The glaring conflict among controlling Federal circuit court precedents as to what elements establish a malicious prosecution claim under §1983 is not relevant or material to the outcome of the instant case. Petitioners did not raise the issue regarding the scope of the elements of a malicious prosecution claim and it is hereby waived. See Thurman v. Yellow Freight Systems, 97 F.3d 833, 835 (6th Cir. 1996). The sole issue upon which the parties focused and battled was

whether "probable cause" existed to arrest the Petitioners. The district court aptly pointed out that both Peet and Spencer relied heavily on the argument that Defendants lacked probable cause to arrest as the basis for establishing their malicious prosecution claim. The district court noted that "Plaintiffs claim that Pearson did not have probable cause to order them arrested and that Pearson manufactured probable cause by twisting the witness statements". (Pet. Apx. Pg 54). The district court found that Pearson had probable cause to arrest. The Sixth Circuit affirmed the grant of summary judgment because of the existence of probable cause. (Pet. Apx. Pg., 80, 82).

This was not a case where the issue raised below was based on what elements would prove a §1983 malicious prosecution claim such that if the court had adopted certain elements as Petitioners claim, the Petitioners claim would proceed to trial. (Petitioners' Brief p.11). Thus, even if a conflict exists among the circuits, this case presents a poor vehicle for resolving it. As emphasized, the resolution of the issue of the proper elements of a malicious prosecution claim is immaterial to the case and will not resurrect this claim.

Following the United States Supreme Court decision in Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed. 2d 114 (1994), the Sixth Circuit recognized that a §1983 claim for malicious prosecution is based on the Fourth Amendment. The Albright decision did not negate the fact that probable cause for the arrest and prosecution of a person remains a chief defense to the claim of malicious prosecution. Thacker v. City of Columbus, 328 F.3d

244 (6th Cir. 2003); Darrah v. City of Oak Park, 255 F.3d 301 (6th Cir. 2001). Only the issue of whether probable cause existed was raised and no other issue related to the malicious prosecution claim was addressed. No one questioned the fact that the petitioners had to prove the absence of probable cause, which they failed to do. Accordingly, it is irrelevant and immaterial to this case that there may be some dispute over all of the elements of a §1983 malicious prosecution claim. It does not matter in the instant case because it is established that where there is probable cause to prosecute, an action for malicious prosecution will not lie. See, e.g. McKinley v. City of Mansfield, 404 F.3d 418, 444-45 (6th Cir. 2005).

The Sixth Circuit Court of Appeals and the district court both found that probable cause existed to arrest. Therefore, the split authority among the circuits as to the proper elements of a claim of malicious prosecution has no bearing on this case. A review of circuits addressed in the Petitioner's Writ show they all include the key element of the absence of probable cause to establish malicious prosecution. Judge Holschuh's dissent discussing the elements of a malicious prosecution claim was based on his belief that probable cause existed. Therefore, he thought it was necessary to "suggest" what the other proper elements should be to establish the claim.

II. THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT BECAUSE PLAINTIFF FAILED AS A MATTER OF LAW TO PROVE A CONSTITUTIONAL VIOLATION UNDER 42 U.S.C. 1983 AND THE FOURTH AMENDMENT, AS THE POLICE ARRESTS WERE BASED ON PROBABLE CAUSE.

The Sixth Circuit Court properly held that the police had probable cause to believe that Spencer and Peet robbed Reed Byrd at the Coney Island. Probable cause to issue an arrest warrant existed in the instant case based on the eye witness identification statement of Feanda Wilson and the line up identification. Peet and Spencer's arrests were based on the independent observations of an eyewitness, Feanda Wilson. A law enforcement officer is entitled to rely on an eyewitness identification to establish adequate probable cause with which to sustain an arrest. Ahlers v. Schebil, 188 F. 3d. 365, 370 (6th Cir. 1999); Skousen v. Brighton High School, 305 F.3d 520 (6th Cir. 2002). Petitioners Peet and Spencer failed as a matter of law to present sufficient evidence that Defendant Pearson and the individual officers deprived them of their constitutional rights under the Fourth Amendment. No genuine issue of material fact existed to dispute that the warrant was issued based upon the existence of probable cause to arrest the Petitioners. See, Vakilian v. Shaw, 335 F. 3d 509, 517 (6th Cir. 2003). The existence of probable cause is an absolute bar to a §1983 claim arising out of the investigation, arrest, detention, or prosecution of a plaintiff. Criss v. City of Kent, 867 F.2d 259, 262-263 (6th Cir., 1988).

The arrests were proper because it was based on facts Officer Pearson had knowledge of at the time of the arrests which established probable cause to arrest. A police officer has probable cause to make an arrest when, at the moment of the arrest, the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information, are sufficient to warrant a prudent and fair-minded person's belief that the plaintiff had committed a felony. Criss v. City of Kent, supra at 262; Michigan v. DeFillippo, 443 U.S. 31, 37, 99 S. Ct. 2627, 2632; 61 L.Ed.2d. 343 (1979).

In the instant case, Feanda Wilson provided the eyewitness testimony. She gave Officer Pearson the pager number of Spencer. Spencer gave his pager number to her for her to contact him. She named him as the person who stated "Shoot that M_ _ _F_ _ _ too." Wilson informed the police that one of the robbers had "been in the restaurant and gave me his phone number it was 232-0235 or 6235". (Pet. Apx. Pg. 76). It is uncontested that the pager belonged to Spencer. She stated that Peet was with Spencer and stole Mr. Byrd's coat or assisted with the theft. Based on Feanda Wilson's statement alone, and later her line up identification of the two, Officer Pearson requested a warrant because there was probable cause to believe Spencer and Peet were working in concert with the unidentified shooter.

Petitioners' chief objection to their arrest is based on Officer Pearson's and the other officer's failure to accept or investigate their exculpatory version of the facts. Probable cause is not negated, however, simply because Petitioners later had witnesses to state that

they were not the murderers or involved with the crime. At the time of the warrant request, none of the witnesses stated in their statements that Spencer or Peet were not involved in the murder. In fact Jmo Bracey indicated that "one of the suspects gave Feanda his pager". Pearson had sufficient inculpatory evidence to give rise to a determination of probable cause. He did not know of any exculpatory evidence that existed at the time of the warrant request.

The alleged evidence and witness statements that Petitioners argue were "twisted, misrepresented or falsified" did not exist on the date that Investigator Pearson submitted the Warrant Request to the Wayne County Prosecutor's Office. The subject crimes occurred in the late night hours of April 27, 2000. The Warrant Request was tendered to the Wayne County Prosecutor's Office the next day, April 28, 2000, accompanied by all then-existing witness statements and summations. No witness stated that Peet or Spencer were not involved in the crime. Where the police have sufficient inculpatory evidence to give rise to a determination of probable cause, failure to perform further investigation does not negate probable cause. Ahlers v. Schebil, supra, at 371; Klein v. Long, 275 F.3d 544 (6th Cir. 2001).

The eyewitness statement and line-up identification of Feanda Wilson was sufficient to implicate Peet and Spencer in the robbery of Mr. Byrd and as conspirators in his murder. Her eyewitness identification was sufficient to create probable cause at the time of the arrest. Officer Pearson was armed with an eyewitness statement, a pager and a line-up identification when he applied for the arrest warrant.

Even prior to the line up, he had probable cause to arrest. In Crockett v. Cumberland College, 316 F.3d 571 (6th Cir. 2003), this Court stated:

> The probability of criminal activity is assessed under a reasonableness standard based on "an examination of all facts and circumstances within an officer's knowledge at the time of an arrest." (Citations omitted)
>
> . . .
>
> Once an officer establishes probable cause, he or she is under no obligation to continue investigating and may instead pursue the arrest of a suspect. See Klein, 275 F. 3d at 551 ("But once a police officer has sufficient probable cause to arrest, he need not investigate further."); (citations omitted).

Crockett, 316 F. 3d at 580-81 (6th Cir. 2003). Therefore, a review of whether probable cause was sufficient for an arrest warrant to be issued is limited to only those factual circumstances known to the officer at the time of the arrest. A suspect's protest of innocence or request for an investigation does not state a claim and the Constitution does not guarantee that only the guilty will be arrested. Baker v. McCollan, 443 U.S. 137, 99 St. Ct. 2689, 61 L. Ed. 2d 433 (1979).

There is no scintilla of evidence that supports the argument that Defendant Pearson in any manner "twisted, misrepresented or falsified witness statements." Significantly, even after the Warrant Request had already been presented to the District Court Judge and signed, Inspector Pearson continued

to investigate the crime to ensure that the correct persons were brought to justice. During the continuing investigation, Investigator Pearson became aware of the fact that Ms. Wilson was the only witness who implicated Peet and Spencer. He included the information in his Progress Notes that he wanted to give her a polygraph exam to determine if she was lying and to inquire about her being fired from her job for theft. Pearson's notes were submitted to the prosecution.

The Sixth Circuit properly "concluded that there is no evidence in the record that Investigator Pearson or the county prosecutor or anyone else supplied the magistrate judge at the hearing with false information to establish probable cause (Pet. Apx., Pg. 81). The Sixth Circuit noted that the "transcript of the preliminary examination in the record shows that the only defense argument made was the alleged insufficiency of the evidence to support the charges, and that argument did not rely on any allegation that false information had been supplied." (Pet. Apx. P. 81).

This entry is important for several reasons. First, the Progress Notes and all the fruit of the investigation were made available to the Wayne County Prosecutor's Office, after the issuance of the warrant. The Prosecutor could have withdrawn the Warrants for Peet and Spencer at any time. The investigation results were also provided to defense counsel. Secondly, the entries establish that Investigator Pearson did not "twist, misrepresent or falsify" any witness statements or have an interest in doing so. Thirdly, it establishes that Investigator Pearson fully disclosed the existence of both

inculpatory and exculpatory statements. The polygraph never occurred, through no fault of Investigator Pearson.

Plaintiffs' defense counsel advised the criminal court judge that the alleged exculpatory witnesses, Jmo Bracey and Leonard Woodward ("McGlory"), had been contacted to come to court and testify on Plaintiff's behalf at the Preliminary Examination. The witnesses' failure to appear is in no way attributable to Defendants.

The witness statements of these alleged witnesses clearly established that no such denial of culpability on the parts of Plaintiff Peet or Spencer were made by these witnesses at the time of the arrest warrant. Not one statement indicates that "Peet and Spencer were not involved." Significantly, none of the evidence of the witnesses "statements" amount to significant, reliable new evidence that suggested that Peet and Spencer were the wrong men or negate probable cause in light of the eyewitness identification of Wilson. None of these verbal statements were made on April 28, 2000. Neither Bracey, Anderson nor Woodward spoke to Defendant Pearson; they were questioned by and gave statements to Defendants William Peterson, Barbara Simon and Frazier Adams, respectively. Most importantly, Petitioners have not submitted one iota of evidence which negates the probable cause created by Feanda Wilson's Witness Statement and positive identification of Peet and Spencer. The mere existence of a scintilla of evidence in support of their claim and some existence of factual dispute on immaterial issues is insufficient to overcome summary judgment.

Anderson v. Liberty Lobby,Inc. 477 U.S.242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

There is no question as to whether Feanda Wilson's statements and identification of Plaintiff constituted probable cause for Plaintiff's arrest. In addressing the issue of probable cause, District Court Judge Jimmylee Gray ruled, in pertinent part, as follows:

> Therefore the Court finds that there's probable cause to believe that Jeemell Spencer by ordering the shooter to shoot and kill Mr. Byrd did, in fact, participate in a first degree premeditated murder. And the Court will bind Mr. Spencer over on that count.
>
> The Court is also of the belief that both Mr. Spencer and Mr. Byrd (sic) knew what was happening and believe - - the Court believes that all three individuals were acting in concert. And the Court finds that there's probable cause to believe that the murder of Mr. Byrd did occur while the armed robbery was occurring and that Mr. Spencer and Mr. Peet participated in the - - along with the third person unidentified with the weapon. So both Defendants are bound over on Count 2.

The Judge found that probable cause existed for Peet and Spencer's arrests based on Feanda Wilson's testimony.

The Sixth Circuit properly determined that there is no authority to support the principle that the police have a Fourth Amendment obligation to release a

suspect once exculpatory evidence comes to light. (Pet. Apx. P. 78). The Sixth Circuit aptly pointed out that "[w]e note that policy does not support such a new development in the law. Such a rule would give investigators the responsibility to reevaluate probable cause instantly with every additional witness and scrap of evidence collected". (Pet. Apx. Pg. 78-79).

Further, Peet and Spencer did not raise the issue that deficiencies in the warrant request amounted to an unconstitutional arrest, which is the theory of the dissent. Therefore, that argument is not properly before this Court. Spencer and Peet only argued that the discrepancies in the warrant request proved that the "officers lacked probable cause for the initial arrest". (Pet. Apx. Pg. 79).

Assuming Peet and Spencer's argument of an unconstitutional arrest is properly before the Court, the Sixth Circuit pointed out the serious flaws in the dissent's analysis:

> First, the dissent relies on information that Pearson obtained after he submitted the warrant request to suggest that Pearson always doubted whether probable cause existed. The evidence, however, shows that Pearson submitted the warrant request on the day after the murder, when signs suggested Spencer and Peet's culpability, and the record does not show that authorities questioned their case after the initial arrest but before authorities submitted the warrant request. The dissent points to Pearson's deposition statement that he "might have had doubts" about Wilson's truthfulness

> before the warrant was signed, but even if Pearson had doubts before the warrant was signed, Pearson's statement does not indicate that those doubts existed before the warrant request was submitted. Second, the dissent faults the investigators for mentioning Wilson's eyewitness identification in their warrant request. While it is true that Wilson identified Spencer and Peet after the initial arrests, her eye-witness identification undermines Spencer's and Peet's claim that there was no probable cause at the time that Pearson submitted the warrant request. In essence, the dissent faults authorities for failing to include post-warrant exculpatory evidence but then faults authorities for including post-arrest incriminating evidence. In this case, there was probable cause at the time of the initial arrest, and the evidence after the arrest but before authorities submitted the warrant requested did not clearly exonerate Spencer and Peet. Third, the dissent demands a level of perfection that would be difficult for most police departments to meet. Undoubtedly, the magistrate judge would have benefitted from a more precise warrant request. ... Such precision, where there is probable cause to justify an arrest, is not a constitutional requirement. (Pet. Apx. Pg. 79-80).

Peet and Spencer's claim for malicious prosecution was correctly dismissed because of the judicial determination of probable cause following the evidentiary preliminary hearing. The determination has a preclusive effect to prevent them from relitigating the issue on a theory of malicious

prosecution because Spencer and Peet failed to show that the state judge relied on false information to determine probable cause existed. See Buttino v. City of Hamtramck, 87 Fed. Appx. 499, 502-05 (6th Cir. 2004). The Sixth Circuit correctly determined that:

> "[T]here is no evidence in this record that Investigator Pearson or the county prosecutor or anyone else supplied the magistrate judgment at that hearing with false information to establish probable cause. To the contrary, the transcript fo the preliminary examination in the record shows that the only defense argument made was the alleged insufficiency of the evidence to support the charges, and that argument did not rely on any allegation that false information had been supplied. (Pet. Apx. Pgs. 81-82).

The Sixth Circuit found that the district court properly granted summary judgment of Peet's claim not only for the above reasons, but because Pearson did not participate in the arrest of Peet. Significantly, there was probable cause to arrest Peet. Feanda Wilson testified at the preliminary examination and in her written statement that Peet was with Spencer and stole Mr. Byrd's coat or assisted with the theft of the coat at the time of death. She identified both of them as stealing the coat. Therefore, there was evidence they acted in concert. The magistrate judge believed that the testimony of Miss Wilson showed that the three suspects were working together in concert and that both Peet and Spencer participated in the robbery of Mr. Byrd.

Petitioners Peet and Spencer's claim that the Wilson identification was unreliable because she was smoking marijuana, her view was obstructed by bullet proof glass and she stole money from the Coney Island on the night in question, does not negate the existence of probable cause or remove Defendant Pearson's objectively reasonable actions. First, there is no evidence to show that Officer Pearson knew about the alleged marijuana, theft, nor any testimony that her view of the murder was obstructed at the time of the warrant request. At the time he submitted all the information available to him to the Prosecutor on April 28, 2000, none of these alleged statements or representations were known to him. Second, when Pearson learned of the allegation that Wilson was fired, he provided all copies of Pearson's case notes to the prosecutor, including the note that Wilson had been fired for theft. Third, Feanda Wilson denied she was fired for stealing on the night in question. She stated that she received her entire check from the job after the incident and subsequently worked for friends of the owners after the murder. Furthermore, the testimony about her lack of ability to view the scene only arose during this civil litigation, in the deposition testimony. No evidence existed to make Ms. Wilson's testimony unreliable at the time the information was submitted to the Prosecutor for a warrant request.

In challenging the affidavit Peet and Spencer rely on several cases in which §1983 claimants prevailed after showing officials made false statements in arrest warrant affidavits. But in those cases, such as Wilson v. Russo, 212 F.3d 781 (3rd Cir. 2000), the remaining evidence did support a finding of probable cause. In Wilson v. Russo, supra, the court determined that the

warrant would have established probable cause without the Defendant's omission or disregard for the truth. Therefore, the arrest was based on probable cause. In the instant case, even without the warrant, Feanda Wilson's identification created probable cause. Petitioners failed to point out specific material false facts that show reckless disregard for the truth and therefore their argument does not undermine the existence of probable cause. United States v. Moncivais, 401 F.3d 751, 757 (6th Cir. 2005).

Petitioners' reliance on Haupt v. Dillard, 17 F.3d 285 (9th Cir. 1994) and Weg v. Macchiarola, 995 F.2d 15,17-18 (2nd Cir. 1993) is misplaced and does not support their argument that the existence of exculpatory evidence will negate probable cause to continue prosecution. (Petitioners' Brief, p. 21). First, Feanda Wilson's eyewitness identification of both Peet and Spencer and Spencer's pager number established probable cause. Second, Haupt did not suggest or hold that new exculpatory evidence negates probable cause as Petitioners contend. The court in Haupt found that the appearance of a witness did not obviate probable cause to prosecute Haupt. Third, in Weg, the Ninth Circuit held that the memorandum of a witness stating that they did not believe the plaintiff committed the crime did not negate probable cause. The case did not hold that probable cause to continue prosecution disappears with discovery of exculpatory evidence. Fourth, none of the cases support the Petitioners' argument that exculpatory evidence negates probable cause under the facts of this case or as a matter of law.

A. Insufficient Evidence Existed to Create a Custom of Arresting Witnesses Without Probable Cause.

Because Petitioners failed to prove that a constitutional violation occurred, the City of Detroit cannot be held liable where there is no underlying constitutional deprivation. Claybrook v. Birchwell, 199 F. 3d 350, 361 (6th Cir. 2000). The Sixth Circuit Court of Appeals correctly affirmed the grant of summary judgment because Peet and Spencer failed to present sufficient evidence to create a genuine issue of fact that the City has a custom or policy of falsely arresting, detaining, and intimidating witnesses to crimes to extract inculpatory testimony. (Pet. Apx. Pgs. 82-83). Clearly, the Petitioners' reliance upon the purported "arrests" of Darryl Williams, Julian Lathem, Jmo Bracey and Peet does not establish a city-wide policy or custom of unconstitutionally "arresting all individuals at a crime scene and holding them to coerce information". The arrests do not show the existence of a custom of arresting witnesses without probable cause.

Petitioners attempt to interject the district court opinion of Taylor v. City of Detroit, 368 F. Supp. 2d 676, 692 (E.D. Mich. 2005) to establish a "custom" is without merit as the Sixth Circuit specifically noted as follows.

> Peet also points to other evidence that we may not consider. For instance, he alleges that in proceedings in a different case in federal district court in Michigan, a Detroit police sergeant admitted that a custom, policy, and practice of

detaining all witnesses exists in Detroit. In particular, Peet cities Taylor v. City of Detroit, 368 F.Supp.2d 676, 692 (E.D. Mich. 2005), to establish this fact. The district court opinion in Taylor does not demonstrate a policy. First, Taylor itself held only that a genuine issue of material fact exists regarding Detroit's alleged custom of arresting witnesses without probable cause. See id. Taylor did not hold that such a custom actually exists; that issue remains to be decided at a later trial. Second, the Taylor court's holding that a genuine issue of material fact existed in that case was record-specific and may not be automatically imposed on other district courts or this court. Since the evidence on which Taylor's denial of summary judgment in favor of the defense is premised is not before this court, Taylor has no relevance to the "custom" issue in this appeal. Third, while Peet had the district court opinion admitted into evidence, he did not obtain admission of the evidence upon which the district court relied. Finally, the plaintiffs point to a consent judgment entered into by the City and the U.S. Department of Justice. The consent judgment is not part of the record in this case.

All told, the plaintiffs have produced only the arrests of Peet, Williams, and Latham as admissible evidence of a city-wide custom of arresting witnesses without probable cause. But that is not enough to create a genuine issue of material fact. A custom or policy must be shown by a "clear and persistent pattern," and three discrete instances in one investigation is simply

not enough to reasonably draw such a conclusion. See Thomas, 398 F. 3d at 432...., no reasonable juror could infer such a custom or policy based on a mere three instances that are limited to one police investigation. (Pet. Apx. Pg. 84-85).

B. Dwight Pearson Is Entitled to Qualified Immunity.

It should be pointed out that the Sixth Circuit Court of Appeals did not address the Defendants' argument that Dwight Pearson was entitled to qualified immunity.

Officer Pearson's actions in the investigation and warrant request were objectively reasonable and were entitled to qualified immunity. The Petitioners reliance on the dissent's reasons for holding Pearson liable does not undermine this argument. The dissent's reasons for assessing liability to Detective Pearson do not address or analyze the issue of Detective Pearson's entitlement to qualified immunity.

Petitioners have failed to meet their burden of proof to demonstrate that Officer Pearson was not entitled to qualified immunity. As established earlier, at the time of the request for an arrest warrant, there were no statements made by other witnesses which were inconsistent with Ms. Wilson's statement in existence. All the statements which Plaintiff claim show their innocence came after April 28, 2000, the day Pearson submitted information to the Prosecutor and made a warrant application. Hence, the actions of Officer Pearson were objectively reasonable.

The witness testimony does not negate the reasonableness of Officer Pearson's action in submitting the information to the Prosecutor for an arrest warrant based on probable cause. Mr. Bracey gave three different and inconsistent statements. The April 28th witness statement of Jmo Bracey mentioned at the end of his statement Feanda Wilson had the pager number of one of the suspects. His statement did not exonerate Peet or Spencer. The statements Bracey made on May 4 and 10, 2000, and the statements of other witnesses who later claimed that Spencer and Peet were not involved, were submitted after the warrant request. Pearson did not have these so-called exculpatory statements at the time of the arrest. Bracey's May 4th statement indicated he was told to say that Peet was not involved and that he feared for his safety. Probable cause was not negated based on the inconsistent and questionable statements of Jmo Bracey and the other witness statements after the existence of probable cause was established. Ahlers v. Schlieb, supra. Hence, Officer Pearson's actions were objectively reasonable. Officer Pearson was under no obligation to give credence to so-called exculpatory witness statements which became available after the warrant was issued.

The Petitioners failed to establish by a substantial showing that Officer Pearson stated a deliberate falsehood or showed reckless disregard for the truth and/or that the alleged omitted information was material to the finding of probable cause. Vakilian v. Shaw, 335 F.3d 517, 509 (6th Cir. 2003). Therefore, no evidence has been presented to overcome his entitlement to qualified immunity.

Peet and Spencer's baseless assertions that Pearson requested a warrant to arrest Peet despite the fact that he "entertained doubts as to the truth of the allegations" is without merit. There is no evidence that Defendant Pearson entertained serious doubts as to the truth of the Feanda Wilson's testimony at the time of the warrant request. Plaintiffs Peet and Spencer relied on verbal statements of his innocence by witnesses, that did not come forth until after the warrant was issued and pressure arose from Peet and Spencer's family. When probable case had been established from a credible victim or eyewitness there is no constitutional duty to investigate further. Woods v. City of Chicago, 234 F.3d 979, 997 (7th Cir. 2000). Probable cause is considered at the time the arrest warrant request was made. Crockett v. Cumberland College, supra. At the time Officer Pearson submitted all relevant information to the Prosecutor on April 28, 2000, he had no reason to believe that Ms. Wilson was not telling the truth.

Taking reasonable action, Pearson made note of the other officers concern that Ms. Wilson's testimony differed from the other statements in the Progress Notes after the arrest warrant request. He indicated he would ask her to take a polygraph examination. Officer Pearson reasonably acted as an objectively reasonable law enforcement officer in continuing to investigate when he realized Ms. Wilson was the only person who implicated Spencer and Peet.

In Hutsell v. Sayre, 5 F.3d 996 (6th Cir. 1993) Petitioners alleged that the police officer obtained a warrant through material false statements made either knowingly or in reckless disregard for the truth.

The Sixth Circuit Court of Appeals stated that "police officers are entitled to qualified immunity however, unless the warrant is so utterly lacking in probable cause that no officer of reasonable competence would have concluded that a warrant should issue". In the instant case, no genuine issue of material facts exist to support the conclusion that the warrant was lacking in probable cause or that Officer Pearson made false statements to obtain the warrant.

It is important to note that in Vakilian v. Shaw, supra, the Sixth Circuit rejected plaintiff's argument that when an allegation of a false swearing to obtain a warrant exists, probable cause is for the jury. See generally, See United States v. Campbell, 878 F. 2d 170, 171 (6th Cir. 1989) (alleged false statements in a supporting affidavit do not invalidate the warrant if the remaining undisputed facts establish probable cause). The Sixth Circuit held that the issue of probable cause is one for the court when qualified immunity is asserted. In Vakilian, supra, the Sixth Circuit Court of Appeals reversed the district court's denial of the defendants' request for qualified immunity. In Vakilian plaintiff charged the defendant with recklessly disregarding the truth in a warrant affidavit. Under the factual circumstances, as a matter of law, Defendant Pearson is entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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DATED: March 31, 2008